

Document:-  
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**Summary record of the 2767th meeting**

Topic:  
**<multiple topics>**

Extract from the Yearbook of the International Law Commission:-  
**2003 vol. I**

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the topic.<sup>16</sup> In 2001, the Commission had adopted the final text of the 19 draft articles on prevention proposed by the Special Rapporteur. In 2002, a new working group had begun studying the second part of the topic on liability and had submitted a report in which it had recommended that the scope of liability should continue to be restricted to the activities dealt with in the part on prevention. The Working Group had reaffirmed the importance of the role of the State and its obligation to ensure that there were regimes of international and national liability to guarantee equitable loss allocation.<sup>17</sup> In his first report on the legal regime of allocation of loss in case of transboundary harm arising out of hazardous activities, the Special Rapporteur adopted many of the Working Group's recommendations, such as those relating to the duties of the State and the need to ensure that the legal regime to be recommended was without prejudice to the law of State responsibility.

52. In part II of his report, the Special Rapporteur referred to a set of international instruments and sectoral and regional arrangements constituting models of allocation of loss. States had concluded a number of conventions and other international instruments which covered a wide range of environmental aspects and dealt generally with international liability arising out of transboundary harm caused by various types of activities, including nuclear and space activities, activities in Antarctica, and the transport of hydrocarbons and noxious and hazardous substances. He also referred to principle 13 of the Rio Declaration calling on States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage and to cooperate to develop further international law regarding liability and compensation.<sup>18</sup> He himself did not dispute the judgement by the Special Rapporteur in paragraph 114 of his report, but the list of instruments was not exhaustive. The Commission should give those instruments further consideration, preferably on the basis of a separate list which would serve as a reference, in order to come up with some common principles and factors that could constitute a legal regime on allocation of loss.

53. The summations and submissions contained in part III of the report showed that the purpose of the study of the topic should be to draft rules governing the allocation of loss that transboundary harm might have caused despite prevention efforts or when prevention had not been possible. Such loss should be allocated between the operator and those who authorized, managed or benefited from the activity, in accordance with the "polluter pays" principle. Those rules should be designed to ensure that innocent victims, whether natural or legal persons or States, were not left to bear the loss caused by transboundary harm. The principle that the innocent victim should be protected was no doubt generally acceptable, but, as the Special Rapporteur pointed out in paragraph 44 of his report, full compensation might not be possible in all cases. The regime to be established should therefore be designed to encourage all parties concerned to take preventive and protective measures in order to avoid damage. There were, of course, States which were unwilling to accept any form

of liability not arising out of the breach of an obligation under internal law or international law. However, the treatment of the subject from the viewpoint of the allocation of loss between the different players, including the State, might be a generally accepted solution to the problem of liability not involving a wrongful act.

54. With regard to the respective roles of the State and the operator, it was the operator, whether private or public, which must assume primary liability, but, in order to facilitate the compensation of innocent victims, loss should be shared by the different players responsible for the transboundary harm through the establishment of special compensation or insurance schemes. If harm in any way gave rise to the liability of the State, such liability could only be secondary or residual in relation to that of the operator, unless the State itself was the main operator of the activity. The residual liability of the State could, for example, be the result of its function of monitoring the activity or of the fact that the private operator concerned could not fully compensate the victims. In such a case, the State could assume that liability by contributing to a compensation fund or an insurance scheme.

55. The criterion of significant harm adopted in the draft articles on prevention should be used as the threshold of harm as of which the regime of allocation of loss would apply. "Ultrahazardous" activities, such as nuclear activities and the transport of oil, might require a more restrictive criterion, but for the time being there did not have to be a separate regime for those activities, which were in any event covered by their own sectoral regimes.

#### Organization of work of the session (*continued*) \*

[Agenda item 2]

56. Mr. KATEKA (Chair of the Drafting Committee) announced that Mr. Economides would replace Mr. Baena Soares on the Drafting Committee for the topic of the responsibility of international organizations.

*The meeting rose at 1 p.m.*

### 2767th MEETING

*Wednesday, 4 June 2003, at 10.05 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskenniemi,

<sup>16</sup> *Ibid.*, paras. 162 and 168 (a).

<sup>17</sup> *Yearbook ... 2002*, vol. II (Part Two), p. 91, paras. 447 and 455.

<sup>18</sup> See footnote 5 above.

\* Resumed from the 2764th meeting.

Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

**International liability for injurious consequences arising out of acts not prohibited by international law (international liability in case of loss from transboundary harm arising out of hazardous activities) (continued) (A/CN.4/529, sect. D, A/CN.4/531<sup>1</sup>)**

[Agenda item 6]

FIRST REPORT OF THE SPECIAL RAPPORTEUR (continued)

1. Mr. AL-BAHARNA, continuing his statement from the previous meeting, noted that some members of the Commission, as well as several delegations in the Sixth Committee, clearly supported the proposal to extend the topic to areas beyond national jurisdiction. It seemed to be acknowledged that the issue should be discussed further.
2. The global commons was a different matter. It did not fall within the scope of the present topic and, moreover, had not been dealt with in the draft articles on prevention of transboundary harm from hazardous activities adopted by the Commission at its fifty-third session.<sup>2</sup> However, it could be taken up as a separate topic at a later stage if the Commission thought necessary.
3. In formulating the concept of a legal regime for allocation of loss, a fair balance should be struck between the rights and obligations of the operator, the beneficiary and the victim, as well as any other actors who might be involved.
4. The recommendations made by the Working Group established at the Commission's fifty-fourth session, in 2002,<sup>3</sup> had focused on models for allocation of loss, to which the Special Rapporteur referred in paragraph 37 of his report (A/CN.4/531). They had gained general approval in the Commission and were largely reflected in chapter III. With regard to the submission in paragraph 153, subparagraph (d), he was not sure that State liability was an exception and was accepted only in the case of outer space activities. The Commission had yet to explore other models for allocation of loss based on various treaties and international instruments and it should not close the door too soon on such a possibility. As for subparagraph (e), the test of reasonableness should be accepted in preference to that of strict proof. With reference to subparagraph (f), he agreed that liability could either be joint and several or could be equitably apportioned. He also believed that the principles in subparagraphs (g) and (h) would further strengthen the legal regime of liability

and that the principle in subparagraph (i) should be acceptable. In line with that principle, States should seek to harmonize their laws of compensation, for, as the Special Rapporteur noted in paragraph 45 of his report, harmonization could be a means of avoiding conflicts of law and contributed to creating certain shared expectations on a regional basis.<sup>4</sup> The submission in subparagraph (j) about compensation for damage to persons and property and damage to the environment and natural resources seemed fair and should be acceptable, whereas the limitations in subparagraph (k) required further consideration.

5. The liability regime should take the form of guidelines to States for negotiating allocation of loss, but he remained open to the suggestion that the draft articles should take the form of a convention similar to the one adopted for the draft articles on prevention. Once the articles were complete, they would need to be cemented by an international dispute settlement mechanism that provided for conciliation and arbitration procedures, perhaps similar to those for the prevention regime.

6. Finally, he supported the Special Rapporteur's intention to speed up the conclusion of work on the topic. The Commission should not spend any more time arguing about the viability of the topic for the purposes of codification or progressive development. The General Assembly had approved the topic at its fifty-sixth session, in 2001,<sup>5</sup> and the time for such arguments was past. As was indicated in paragraph 36 of the report, the Assembly had urged the Commission in 2001 to proceed promptly to the study on liability.<sup>6</sup> The debate in the Sixth Committee in 2002 had been constructive and supportive. He therefore endorsed the proposal to establish a working group.

**Statement by the Legal Counsel**

7. The CHAIR invited Mr. Hans Corell, Under-Secretary-General for Legal Affairs, Legal Counsel, to brief the Commission on the latest legal developments in the United Nations.

8. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) congratulated the newly elected members of the Commission and also the Commission on having added three new topics to its agenda. He looked forward to the results of its work and recalled that the General Assembly, in paragraphs 4 and 5 of its resolution 57/21, had reiterated its invitation to Governments to provide information on State practice for two topics on the Commission's agenda. Such inputs were certainly valuable and he wished to emphasize that without them the Commission did not receive the requisite guidance.

9. In paragraph 8 of the same resolution, the General Assembly noted the Commission's position on cost-saving measures and encouraged it to continue taking such measures. He trusted the Commission would bear that in mind not only when considering the duration of its

<sup>1</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).

<sup>2</sup> See 2762nd meeting, footnote 7.

<sup>3</sup> See 2763rd meeting, footnote 2.

<sup>4</sup> P. W. Birnie and A. E. Boyle, *International Law and the Environment*, 2nd ed. (Oxford University Press, 2002), p. 279.

<sup>5</sup> General Assembly resolution 56/82 of 12 December 2001, para. 3.

<sup>6</sup> *Ibid.*

next session and whether it should be a single or split session but also when planning its weekly programmes and conducting its meetings. It was a matter of some concern to him that the Commission's use of conference services had dropped to 80 per cent of available time in 2002, a matter that he would be discussing with the Committee for Programme and Coordination and the Advisory Committee on Administrative and Budgetary Questions on his return to New York.

10. In paragraph 57 of his report entitled "Improving the performance of the Department of General Assembly Affairs and Conference Services",<sup>7</sup> the Secretary-General had introduced a policy of "enforcing page limits", under which the 20-page limit would henceforth serve as a guideline for all reports not originating in the Secretariat. Despite his objections as the Legal Counsel, the Department had been determined to apply those guidelines very strictly. Consequently, he had had to request specific waivers, which had been granted, for all the reports of special rapporteurs. It was meaningless if the Commission could not develop its thinking in the space needed when its work generated the major documents adopted by the Sixth Committee.

11. The Rome Statute of the International Criminal Court had entered into force on 1 July 2002, and the first session of the Assembly of States Parties had taken place from 3 to 10 September 2002. The first session had resumed in February 2003 for the election of judges. Eighteen had been elected in accordance with an innovative procedure, involving complex maximum and minimum voting requirements, which had successfully ensured an adequate regional and gender distribution in the Court's composition. The judges had been inaugurated at a solemn ceremony held in The Hague on 11 March, and Judge Philippe Kirsch of Canada had been elected President of the Court. At its resumed session on 21 April, the Assembly of States Parties had by consensus elected Mr. Luis Moreno Ocampo of Argentina as Prosecutor. At the same meeting, 10 of the 12 members of the Committee on Budget and Finance had been elected. The remaining two members, from the Group of Eastern European States, would be elected in September. Nominations had been invited for members of the Board of Directors of the Trust Fund for victims and their families. The judges were expected to appoint the Registrar of the Court soon, thereby filling the last remaining principal position on the Court.

12. The Assembly of States Parties would be holding its second session at United Nations Headquarters from 8 to 12 September 2003, at which time it would also hold the first meeting of the special working group on the crime of aggression which was to continue work on the definition of that crime.

13. The purpose of the Special Court for Sierra Leone set up on 16 January 2002 pursuant to Security Council resolution 1315 (2000) of 14 August 2000 was to prosecute persons who bore the greatest responsibility for committing crimes against humanity, war crimes and other serious violations of international humanitarian law, as well

as certain crimes under the relevant laws of Sierra Leone. Unusually, the Court had been set up by an agreement between the United Nations and the Government of Sierra Leone, and its expenses were covered by voluntary contributions from the international community. The Prosecutor, Mr. David Crane, acted independently as a separate organ of the Court. The Government of Sierra Leone had appointed Mr. Desmond da Silva as Deputy Prosecutor, while the Secretary-General had appointed the Registrar, Mr. Robin Vincent. The Secretary-General had also appointed two Trial Chamber and three Appeals Chamber judges, while the Government had appointed one Trial Chamber and two Appeals Chamber judges. The judges had elected Mr. Geoffrey Robertson of Australia as their President. Again unusually, a management committee composed of representatives of the Government, the United Nations and the major contributors had been overseeing the Court's non-judicial functions since January 2002. On 10 March 2003, the Prosecutor had announced that he had indicted seven individuals, five of whom were currently in Court custody; one had reportedly been murdered in Liberia, and active efforts were being made to secure the arrest of the seventh. The trials might begin in 2003.

14. The Commission would recall that negotiations had begun in 1999 between the Secretary-General and the Government of Cambodia on United Nations assistance in drafting a national law for a special national court to try Khmer Rouge leaders and for the participation of foreign judges and prosecutors in the proceedings. The Secretary-General had reluctantly discontinued the negotiations in February 2002. In paragraph 1 of its resolution 57/228 A of 18 December 2002, the General Assembly had requested the Secretary-General to resume them, and exploratory meetings had been held in New York in January 2003, following which he, as the Legal Counsel, had travelled to Cambodia in March to conduct detailed negotiations with the Government. The result had been the draft agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea, which the General Assembly had approved in its resolution 57/228 B of 13 May 2003. He would be signing the agreement in Phnom Penh on 6 June, after which it would have to be ratified by the relevant constitutional authorities of Cambodia and would enter into force once the necessary legal requirements had been met on both sides. In the meantime, much work remained to be done, especially to prepare for the practical implementation of the agreement and to raise the necessary funding. The General Assembly had decided that the assistance to be provided to the Government by the United Nations should be funded from voluntary contributions, although it could be argued that, as a matter of constitutional principle, courts should be financed by assessed contributions.

15. The Commission would recall that the General Assembly, in paragraph 2 of its resolution 57/16 of 19 November 2002, had decided to reconvene the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property to make a final attempt at consolidating areas of agreement and resolving outstanding issues with a view to drafting a generally acceptable instrument based on the

<sup>7</sup> A/57/289. The Department of General Assembly Affairs and Conference Services was renamed the Department of General Affairs and Conference Management as of 16 January 2003.

draft articles on jurisdictional immunities of States and their property adopted by the Commission at its forty-third session<sup>8</sup> and on the discussions of the open-ended working group of the Sixth Committee and the Ad Hoc Committee. Outstanding issues had included the criteria for determining the commercial character of a contract or transaction under article 2, paragraph 2; the concept of a State enterprise or other entity in relation to commercial transactions under article 10, paragraph 3; contracts of employment under article 11; pending issues relating to articles 13 and 14; pending issues relating to the effect of an arbitration agreement under article 17; and issues concerning measures of constraint against State property under article 18. There had also been issues concerning criminal proceedings in the context of the draft articles, as well as the relationship of the draft articles with other agreements.

16. Informal consultations on article 2, paragraph 2, had been coordinated by Mr. Yamada; those on article 10, paragraph 3, and article 11, criminal proceedings and the relationship with other agreements had been coordinated by Mr. Bliss, Legal Adviser to the Permanent Mission of Australia to the United Nations; and those on articles 13, 14 and 17 and on measures of constraint under article 18 had been coordinated by Mr. Hafner of Austria, Chair of the Ad Hoc Committee.

17. Under Mr. Hafner's able chairship, the Ad Hoc Committee had successfully completed its work. The full text of the draft articles and understandings was contained in the Ad Hoc Committee's report to the General Assembly.<sup>9</sup> The Ad Hoc Committee had referred back to the Assembly the matter of the final form of the draft articles.

18. In its resolution 57/27 of 19 November 2002, the General Assembly had renewed the mandate of the Ad Hoc Committee on International Terrorism, which had been established under Assembly resolution 51/210 of 17 December 1996, and which, under Assembly resolution 54/110 of 9 December 1999, was to consider the drafting of a comprehensive convention on international terrorism. The substantial progress achieved in negotiations launched in late 2000 was reflected in the reports of the Ad Hoc Committee.<sup>10</sup> Despite that progress, serious difficulties remained on the key elements of the future convention, namely the definition of terrorism; the relationship of the draft convention to existing and future instruments on international terrorism; and differentiation between terrorism and the right of peoples to self-determination and to combat foreign occupation.

19. Work on the convention had been very nearly finished by October 2001, but events in the Middle East had poisoned the climate for negotiation, and, until the political atmosphere improved, little progress was likely to be made. The Ad Hoc Committee had met from 31 March to 2 April 2003 and continued its work on the convention, in spite of the divergent viewpoints. The Sixth Committee

would carry on with that work at the fifty-eighth session of the General Assembly. The Ad Hoc Committee also had on its agenda the draft international convention for the suppression of acts of nuclear terrorism, an initiative of the Russian Federation, but the project was so closely linked to the work on the comprehensive convention that he thought it unlikely that one endeavour would move ahead without the other.

20. Since February 2000, the Ad Hoc Committee had also been concerned with the convening of a high-level conference on terrorism. Some delegations had expressed support for such a conference, which could, *inter alia*, focus on concrete measures to strengthen the existing framework of international cooperation; look into preventive measures such as promotion of cooperation among national law enforcement authorities; and develop a definition of terrorism. Other delegations, however, had doubts about the practical benefits of such a conference and considered that the outcome of work on the comprehensive convention should be awaited before convening a conference.

21. The United Nations Secretariat had made strong efforts to draw attention to existing anti-terrorism conventions. Special treaty events had been held at Headquarters in November 2001 and November 2002, with particular emphasis on the main anti-terrorism instruments. Another such event was to be held in late 2003. In 2001, the Office of Legal Affairs had published a collection of international instruments related to the prevention and suppression of international terrorism,<sup>11</sup> and in 2002, it had issued a compendium of national laws in that field.<sup>12</sup> It maintained close cooperation with the Terrorism Prevention Branch of the United Nations Office on Drugs and Crime in Vienna.

22. The Security Council had been active in the anti-terrorism effort. On 20 January 2003, it had held a special ministerial meeting whose main objective had been to give new impetus to the struggle against terrorism. As a result of that high-level meeting, the Security Council had adopted resolution 1456 (2003), annexed to which was a declaration on combating terrorism. In the declaration, the Security Council encouraged Member States of the United Nations to cooperate in resolving all outstanding issues with a view to the adoption, by consensus, of the draft comprehensive convention on international terrorism and the draft international convention for the suppression of acts of nuclear terrorism.

23. On 6 March 2003, the Counter-Terrorism Committee established in accordance with Security Council resolution 1373 (2001) of 28 September 2001, had held a meeting with representatives of 60 international, regional and subregional organizations to exchange views on adopting a coordinated approach to combating international terrorism. In his opening address, the Secretary-General had stressed the need to develop an international programme of action to fight terrorism and uphold the rule of law and

<sup>8</sup> *Yearbook ... 1991*, vol. II (Part Two), document A/46/10, p. 13, para. 28.

<sup>9</sup> *Official Records of the General Assembly, Fifty-seventh Session, Supplement No. 22 (A/57/22)*, annex.

<sup>10</sup> *Ibid.*, *Fifty-sixth Session, Supplement No. 37 (A/56/37)*; *ibid.*, *Fifty-seventh Session, Supplement No. 37 (A/57/37)*; *ibid.*, *Fifty-eighth Session, Supplement No. 37 (A/58/37)*.

<sup>11</sup> *International Instruments related to the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E.01.V.3).

<sup>12</sup> *National Laws and Regulations on the Prevention and Suppression of International Terrorism* (United Nations publication, Sales No. E/F.02.V.7).

the importance of fighting poverty and injustice so as to address the conditions used as justifications by terrorists. Many references had been made to promoting the ratification and appropriate implementation of the 12 anti-terrorism conventions.<sup>13</sup> A communiqué issued at the end of the meeting had emphasized exchange of information, complementarity and giving priority to counter-terrorism initiatives. A follow-up meeting to be hosted by OAS would be held later in the year in Washington, D.C.

24. Another matter of great concern was the protection of United Nations personnel. The cable traffic at Headquarters brought news every day of the difficult and exposed situation of staff in the field, and, sadly, many staff members lost their lives every year. The Ad Hoc Committee on the Scope of Legal Protection under the Convention on the Safety of United Nations and Associated Personnel had met for a week in March 2003 to continue its discussion of measures to enhance the existing protective legal regime for United Nations and associated personnel. The Committee had focused on the Secretary-General's recommendation that the scope of the Convention be extended to all United Nations operations and to associated personnel from non-governmental organizations. It was a cause of serious concern that United Nations staff members were now being deliberately targeted by participants in armed conflict.

25. The United Nations Convention on the Law of the Sea, which had had its genesis in the Commission's work in the 1950s, now had 142 Parties, including the European Communities. A report prepared for the forthcoming fifty-eighth session of the General Assembly and available on the website of the Office of Legal Affairs covered all the latest developments in relation to the law of the sea. The website of the Office's Division for Ocean Affairs and the Law of the Sea had recently been updated and offered most official documents in all the official languages.

26. The twentieth anniversary of the opening of the Convention for signature had been commemorated from 9 to 10 December 2002, and the thirteenth meeting of the States Parties would be held from 9 to 13 June 2003. The Commission on the Limits of the Continental Shelf had received its first submission and would be holding its twelfth and thirteenth sessions from 28 April to 2 May 2003 and from 25 to 29 August 2003, respectively. The second round of informal consultations on the conservation and management of straddling fish stocks and highly migratory fish stocks was to be held from 21 to 25 July 2003 at United Nations Headquarters. While the latest po-

<sup>13</sup> Convention on Offences and Certain Other Acts Committed on Board Aircraft; Convention for the Suppression of Unlawful Seizure of Aircraft; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents; International Convention against the Taking of Hostages; Convention on the Physical Protection of Nuclear Material; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, supplementary to the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation; Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf; Convention on the Marking of Plastic Explosives for the Purpose of Detection; International Convention for the Suppression of Terrorist Bombings; International Convention for the Suppression of the Financing of Terrorism.

litical events and international crises tended to attract attention, the materials and meetings he had just mentioned conveyed a gloomy message about the state of the world's oceans, and it was to be hoped that awareness of the problem would be heightened.

27. The thirty-sixth session of UNCITRAL was to be held in Vienna from 30 June to 11 July 2003. The membership of UNCITRAL had been increased from 36 to 60 under General Assembly resolution 57/20, of 19 November 2002. The session would address the adoption of the draft model legislative provisions on privately financed infrastructure projects, arbitration, electronic commerce and the draft legislative guide on insolvency law.

28. Information on publications, including the question of responsibility for maintaining the *Repertory of Practice of United Nations Organs*, technical support, websites, and other activities that might be of interest to the Commission would be provided to members in writing. Finally, he wished to raise an issue about which the legal advisers of the United Nations system, whose annual meeting he chaired, had recently expressed concern. They had observed that the Internet was basically operating without any international legal regime, although in the past, when communication systems that had international consequences had been developed, States had got together to regulate the new phenomenon. While regulation of the Internet was primarily a policy issue, the legal advisers wished nevertheless to convey three of their concerns to the Commission. First, the Internet was of fundamental importance as an instrument of communication, commerce, political and cultural expression, education and scientific cooperation. Second, national laws and court systems were not able to provide a sufficient legal framework for much of the activity on the Internet. Third, it was urgent to develop a legal architecture and international institutions that favoured the further development of Internet activities within an environment of legal certainty, respect for the rule of law and respect for their international character. Website hijacking—for example, when persons seeking information on women's issues found themselves in a highly objectionable environment—was one of the many problems that had to be dealt with.

29. The CHAIR thanked the Legal Counsel for his valuable report on the activities of the Office of Legal Affairs. Of particular interest had been the information on the work of the International Criminal Court and other international tribunals, jurisdictional immunities of States, the law of the sea, terrorism, protection of United Nations personnel and the new phenomenon of Internet activity.

30. Mr. BROWNLIE asked for further information on the problems with the world's oceans.

31. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel) said that the report prepared for the fifty-eighth session of the General Assembly dealt with a variety of aspects of the overall problem, and he would merely mention a few. Depletion of the ocean's resources was an unexplained and disturbing phenomenon. Coral reefs, which served as nurseries to many varieties of fish, had suddenly and inexplicably become bleached. Both land-based and sea-based pollution had to be tackled. In the aftermath of the recent *Prestige* disaster, thought

needed to be given to flag State jurisdiction, namely, how to deal with a situation in which States had no proper authority over ships flying their flags. Were global warming and depletion of the glaciers, with the corresponding potential rise in the ocean's level, part of natural cycles or were they the result of human interventions?

32. Mr. DUGARD said that special rapporteurs of the International Law Commission fulfilled very different functions from special rapporteurs of other bodies. For the Commission on Human Rights, for example, special rapporteurs wrote reports that facilitated political debate, whereas the studies done by special rapporteurs of the International Law Commission formed the very basis for that body's work. The submission of very brief reports would be difficult to contemplate, since that would only restrict the Commission's debates and thus the progress of its work. He appealed to the Legal Counsel to use his influence to try to persuade members of the Fifth Committee of the special nature of the Commission's work.

33. There was no need to recall that members of the Commission were unhappy that their honoraria had been withdrawn as from 2002, but he wished to place on record his personal view that the withdrawal of the honoraria of the special rapporteurs was exploitative and unfair. It meant that they had to work for several months each year, in addition to during the Commission's sessions, for no remuneration whatsoever, and in many instances that they were denied the possibility of employing research assistants.

34. As to the anti-terrorism measures described by the Legal Counsel, a dangerous phenomenon had followed the adoption of Security Council resolution 1373 (2001) invoking Chapter VII of the Charter of the United Nations to direct States to take action to suppress terrorism. Many States had gone overboard in the adoption of domestic legislation. One State, for example, had simply defined terrorism as an illegal act, while others had defined it as an unlawful act involving violence designed to influence government policy, which in effect meant that any anti-governmental activity fell within the ambit of terrorism. Yet human rights standards had to be balanced with measures to suppress international terrorism. Accordingly, when working on the definition of international terrorism, the international community should also work to prevent States from taking advantage of the opportunity to settle domestic disputes by taking firm action against the opposition.

35. Ms. ESCARAMEIA asked the Legal Counsel to provide details on any steps being taken to follow up the proposal in paragraph 62 of the Secretary-General's report "Improving the performance of the Department of General Assembly Affairs and Conference Services"<sup>14</sup> for a study of the practical and cost implications of replacing summary records with digital recordings. It would be very bad for the Commission if the summary records were replaced. She would also appreciate an explanation of what was meant in paragraph 54 by the reference to a "new system of improved advance upstream planning".<sup>15</sup> Did it entail the page limit on reports of special rapporteurs

and the replacement of summary records? What could be done to avoid such developments? The Commission would probably address those issues in its report, and the Sixth Committee might also take them up in its resolution relating to the Commission. The very practice of requesting a waiver of the 20-page limit was a repetitive task requiring considerable work in the Codification Division and in other bodies. In her view, the page limit should be waived once and for all. Would the Legal Counsel be meeting with senior officials in the Department to discuss changing that practice? It was disturbing that the waiver practice might remain unchanged despite the Commission's expression of concern.

36. With regard to the reference to the need for a legal regime for the Internet, had the Legal Counsel discussed the issue with other bodies within and outside the United Nations system, requested studies from them or consulted any Internet experts? How far had the plan matured?

37. Mr. MELESCANU, noting that the legal advisers had decided they should convey their legal concerns about the Internet *inter alia* to the Commission, asked whether they had done so to other bodies in the United Nations system or to Internet experts. Was the Commission expected merely to take note of the legal concerns expressed, or was more concrete action wanted, and if so, in what form?

38. Mr. Sreenivasa RAO said it was quite surprising to learn that a 20-page limit had been placed on the length of reports of special rapporteurs and that a waiver was required for any report that exceeded that limit. In the case of his own report, he could have shortened it from the current 52 pages to 20, but then it would have taken three sessions, and thus three years, for him to present it in its entirety. Surely that would not be in the interest of efficiency. If members were to grasp the topic quickly, they needed to have all the material at once, something that would be impossible if the report was restricted to a certain number of pages. Nor would a special rapporteur be able to obtain the reaction of the other members to the subject matter as a whole. The discussion would lose itself in constant requests for clarifications, which were unnecessary when all the material was available. With the 20-page limit, the topic would require a time frame that was inefficient and, as such, unacceptable.

39. Another issue was the assistance special rapporteurs needed and were normally entitled to. Honoraria were only a modest contribution to meeting their needs. If they were not forthcoming, that too would have an adverse impact on the efficiency of the Commission's work and, indeed, on its very purpose. The honoraria must be seen in the broader context, and not merely as a cost-cutting question. Apparently, the United Nations had begun to undervalue the aspects of its work on legal issues. This was a dangerous development.

40. Mr. MANSFIELD said that the need to coordinate issues relating to the oceans and the law of the sea involved the responsibilities and mandates of a wide range of United Nations bodies that were separate legal entities answerable to their members, and that even the Secretary-General had no authority to order such coordination. Another problem was that Member States gave different levels of instructions. He hoped the Legal Counsel could

<sup>14</sup> See footnote 7 above.

<sup>15</sup> *Ibid.*

provide some positive news on how the legal and structural issue could be addressed. If the Commission were to take up the question of the Internet, it would raise the same kind of problem, namely, some mechanism would be needed to deal with the separate legal existence of the various United Nations specialized agencies and find a way to adopt a coordinated approach.

41. Mr. PELLET thanked the Legal Counsel for engaging in what he personally had always regarded as a very useful exchange of views. The suggestion to discontinue the work on the *Repertory of Practice of United Nations Organs* and to ask an academic institution to maintain it was completely absurd, the product of bureaucratic inventiveness gone mad. Academic institutions could not take on such a task. On the contrary, it was up to the Secretariat to provide the Commission with data on the *Repertory of Practice*. It was inconceivable for such work to be done otherwise than from within.

42. His other concern was the very serious threat hanging over the secretariat of the Commission. As he understood it, it was planned—in another fit of bureaucratic delirium—to have the secretariat of the Commission serviced by some sort of bureaucratic monster, a secretariat in charge of all United Nations conferences. That, too, sounded like a completely insane idea. It was inconceivable that those who serviced and assisted the Commission should have no idea about international law. The Commission's staff had very extensive legal training that was invaluable and indispensable. If the proposed idea was really taken further, the Commission must issue a very strong formal protest.

43. He associated himself fully with the comments by Mr. Dugard and Mr. Sreenivasa Rao regarding the obstacles to the work of special rapporteurs. Everything seemed to suggest that the Commission was being subjected to the whims of people who had no idea of what the Commission did; even assuming that they had a slight idea of what its purpose was, the way the Commission was treated did not testify to any high esteem for its work. The current developments, far from being encouraging, were worrisome and, indeed, alarming.

44. Mr. MOMTAZ, referring to the Convention on the Safety of United Nations and Associated Personnel, said that the threats hanging over such personnel were very worrying. He gathered that negotiations were under way to extend the scope of the Convention. The Legal Counsel had spoken of the need to extend the scope of the Convention to include not only all United Nations activities but also all field staff of non-governmental organizations. He could not imagine what the obstacles were to such a step, or why negotiations had not been successful to date.

45. Mr. KOSKENNIEMI said he was concerned about the emphasis the Office of Legal Affairs placed on the issue of terrorism and the suggestion that regulation of the Internet might be of great importance in the future. Those two subjects came from a very narrow sector of the international community and reflected the concerns of the developed world. International terrorism quickly faded to insignificance when compared to other problems. Given the enormous disparities in wealth between the developed and the developing countries, and in view of the—preventable—death every year of millions of children due to

malnutrition, the priorities of the international community or, for that matter, of the Office of Legal Affairs should not be terrorism or the Internet. Clearly, it was not easy for the Office of Legal Affairs to address development issues, but he could cite two examples it might find instructive. One was in the field of law and development. He was personally associated with the Asian Development Bank, whose legal office had embarked upon a very successful, wide-ranging programme on law and development in East Asia, where legal cultures were not well rooted in the traditional economic and social systems. The other example had to do with the Global Compact, the Secretary-General's initiative of several years earlier, in which the Secretary-General himself had undertaken to work with transnational corporations on standards and good governance practices in their activities in the developing world. One of the attractions of the Global Compact was that it did not aim to create legally binding standards, although there was in fact an undercurrent in the debate that binding standards on good governance and transparency might be envisaged at some point. Thus, such avenues did exist, and he suggested that, in order to get their priorities right, the United Nations and the Office of Legal Affairs might do some useful work there.

46. Mr. GALICKI said it was gratifying that the tradition of the Legal Counsel meeting with the Commission every year had been continued at the present session.

47. He endorsed Mr. Pellet's remarks. It was inconceivable for the Commission to be serviced by a general unit of the Department of General Assembly Affairs and Conference Management. It was worth noting that, at the meeting on the subject in the Sixth Committee, all the representatives of States had spoken out against such a measure. The Commission had long had excellent experience working with the secretariat of the Codification Division and was aware of the burden of servicing the session, preparing reports, and so on. He asked the Legal Counsel to provide additional information on recent developments and to inform all those concerned that the members of the Commission were strongly opposed to such a change, which would be very detrimental to its work. He entirely agreed with Mr. Pellet about the need for a strong protest, which should be included in the Commission's report.

48. Mr. CORELL (Under-Secretary-General for Legal Affairs, Legal Counsel), replying to Mr. Dugard, who had raised the issue of the length of reports, said the decision to enforce page limits had been taken by the Department of General Assembly Affairs and Conference Management, in response to requests by Member States that the work of the General Assembly should be made more relevant, more coordinated and less bureaucratic. At the coordination meetings convened by the Under-Secretary-General for General Assembly Affairs and Conference Management, he consistently emphasized that simply reducing the length of reports served no purpose, as a meaningful discussion of the contents would thereby be precluded. While it was regrettable that such an obvious point needed making, it had to be said that his requests for waivers had never yet been turned down.

49. On the question of terrorism, the Secretary-General himself had on a number of occasions highlighted the issue of protection of human rights. Human rights stand-



ards must be borne firmly in mind when the Commission started to address the question of terrorism; failure to do so would result in the creation of precisely the kind of society that the terrorists would like to see, and the whole purpose of the exercise would be defeated. In his own—perhaps simplistic—view, terrorist acts were acts already criminalized in the penal code of every Member State. The real issue was the different context in which crimes of terrorism were committed, since the victims were innocent people unconnected with the purposes of the perpetrators. Nevertheless, irrespective of whether the crime was an act of terrorism or an “ordinary” crime, the same human rights standards must be observed—a point that had been stressed by the United Nations High Commissioner for Human Rights.

50. He was not apprised of the details of the measures proposed in paragraph 62 of the Secretary-General’s report, to which Ms. Escameia had referred. The proposals represented one possible means of making the work of the General Assembly more efficient. The effects of those across-the-board measures on the various bodies would need to be evaluated. As he had already stated, his intention was to bring the views expressed at the present meeting, as reflected in the summary record, to the attention of the Under-Secretary-General for General Assembly Affairs and Conference Management.

51. The Internet was a remarkable tool that could be put to the service of all humankind, but also one that could be abused. It was thus important that all those who had a mandate in any particular field should be aware that they might be under an obligation to take up the matter. The issue, which was basically one of policy, had been discussed for several years by the legal advisers to the entire United Nations system, including its specialized agencies. On the copyright aspects, for example, the Legal Adviser of WIPO was taking measures to bring the various concerns to the attention of the relevant bodies, and he himself had addressed a WIPO body on behalf of his fellow legal advisers. The other legal advisers would also raise the issue in their respective organizations. However, it was not for him, as Legal Counsel, to take steps that were basically political: it was for Member States to take those steps. The most he could do was to raise the question in the bodies with which he interacted, and that was why he had raised it in the Commission, which might or might not wish to discuss it. The legal advisers had agreed, not on steps to be taken, but on talking points. The talking points on the Internet issue had been circulated to members of the Commission.

52. On the question of honoraria, in cases where they had already been earned before the General Assembly had taken its decision, he had taken the very firm position that the Organization must honour its commitment. However, the question of the legality of the decision of the General Assembly was a different matter and had proved to be less straightforward than it might at first appear. Nonetheless, the issue had given rise to such extensive debate that he was confident the General Assembly, and the Fifth Committee in particular, would return to it.

53. As to the coordination of ocean affairs, the legal advisers had very efficient means of communicating important developments via the Internet. The idea put forward at

the previous session of the General Assembly had been to seek better coordination of ocean issues at the Secretariat level. The intention was not to bring everything together under a single umbrella: agencies such as FAO, UNESCO and IMO should be allowed to continue to work with their own special expertise within the area of the law of the sea. Nonetheless, there were some areas, such as refugee issues, oil transportation and flag State jurisdiction, where a gap between mandates needed to be bridged. After the new mandate had functioned for a year or so, it might perhaps become clearer how the new ideas put forward had been addressed by Member States. He had requested the Division for Ocean Affairs and the Law of the Sea to come up with further ideas, to enable terms of reference to be drafted with a view to enhancing the various mandates and providing a further basis for interaction.

54. There had indeed been a proposal to discontinue publication of the *Repertory of Practice of United Nations Organs* in its present form. One idea had been to consult with academia, and in that context he had had the benefit of Mr. Pellet’s advice in the latter’s professorial capacity. The emerging message seemed to be that the activity was not one that could be easily undertaken by any academic institution. That view would be brought to the attention of the legislative bodies when the matter was discussed in the Fifth and Sixth Committees at the next session of the General Assembly, as would the views concerning bureaucracy and the secretariat of the Sixth Committee. The problem was one of scarce financial resources.

55. Mr. Momtaz had asked for information about the negotiations in connection with the Convention on the Safety of United Nations and Associated Personnel. The Director and the Deputy Director of the Codification Division might be better qualified than himself to give a precise answer to that question, and the Chair might thus wish to give one or the other the floor to respond.

56. The socio-economic issues raised by Mr. Koskenniemi were certainly on the agenda, and the Secretary-General never failed to draw attention to them in major international forums. However, while he fully agreed with Mr. Koskenniemi’s comments regarding development issues, it had to be asked to what extent the Office of Legal Affairs was mandated to deal with those matters. The Office had only 160 staff members and, in his view, it should not undertake services of general assistance in law and development, which were already provided by other units within the Organization. Its task was to offer guidance in locating such assistance: legal advisers requested by foreign ministers to identify possibilities for technical assistance were able to access such information instantaneously via the Office’s website. However, it was in UNDP and the World Bank, bodies with the mandate and the means, rather than the Office of Legal Affairs, that the expertise needed to formulate programmes was to be found. Similarly, ILO and OHCHR were the bodies best placed to help States enhance their human rights legislation. While in Kosovo and East Timor—to cite just two examples—the Office of Legal Affairs had reviewed every regulation from a constitutional perspective, to ascertain whether it was in accordance with the Charter of the United Nations, the relevant resolution and human rights standards, it had not tried to second-guess the technical solutions in, for instance, banking legislation. In short, he had tried to take a

strategic view, singling out knowledge, language, money and need as the key elements which, if combined, could lead to the creation of projects.

57. Mr. Galicki had asked about the current status of the proposal regarding the Commission secretariat. The Advisory Committee on Administrative and Budgetary Questions had examined the proposal, and it had been forwarded to the Fifth Committee. To what extent the Fifth Committee would consult the Sixth Committee remained to be seen. In any case, a decision on the matter would be taken at the next General Assembly.

*The meeting rose at noon.*

## 2768th MEETING

*Thursday, 5 June 2003, at 10 a.m.*

*Chair:* Mr. Enrique CANDIOTI

*Present:* Mr. Addo, Mr. Al-Baharna, Mr. Brownlie, Mr. Chee, Mr. Daoudi, Mr. Dugard, Mr. Economides, Ms. Escameia, Mr. Fomba, Mr. Gaja, Mr. Galicki, Mr. Kabatsi, Mr. Kateka, Mr. Kolodkin, Mr. Koskeniemi, Mr. Mansfield, Mr. Melescanu, Mr. Momtaz, Mr. Operti Badan, Mr. Pambou-Tchivounda, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Rodríguez Cedeño, Mr. Rosenstock, Mr. Yamada.

### Diplomatic protection<sup>1</sup> (*continued*)\* (A/CN.4/529, sect. A, A/CN.4/530 and Add.1,<sup>2</sup> A/CN.4/L.631)

[Agenda item 3]

#### REPORT OF THE DRAFTING COMMITTEE

1. Mr. KATEKA (Chair of the Drafting Committee), introducing the report of the Drafting Committee on the topic of diplomatic protection (A/CN.4/L.631), said that the Committee had held five meetings from 8 to 14 May and on 28 May 2003. The Committee had begun its work on the topic at the Commission's fifty-fourth session and had adopted, on first reading, articles 1 to 7 covering Parts One and Two of the draft articles. At the current session, the Committee had turned its attention primarily to the draft articles on the rule on the exhaustion of local remedies. It had also discussed several draft articles on the diplomatic protection of legal persons, but, owing to the

lack of time, had been able to work only on one such provision. It had therefore decided to postpone the referral of the provision to the plenary until the next session so that all the provisions on legal persons could be submitted in a single package.

2. With regard to the structure of the draft articles, he recalled that draft articles 1 to 7, which had been adopted at the preceding session, dealt with general provisions (Part One) and natural persons (Part Two). At the current session, the Committee had decided to include the articles on the exhaustion of local remedies in a separate part so that they would apply both to the part on natural persons and to the future part on legal persons. The structure of the draft articles would thus include Part Three on legal persons, followed by Part Four on the exhaustion of local remedies rule. When the Committee had considered the three draft articles on that rule, it had not yet had before it the draft articles constituting the future Part Three, and it had therefore renumbered the draft articles it had considered to follow on those already adopted on first reading (1 to 7). The three draft articles previously proposed by the Special Rapporteur as articles 10, 11 and 14 thus became articles 8, 9 and 10, respectively. A footnote to the Committee's report nevertheless explained that those three provisions would again be renumbered when Part Three of the draft articles had been completed. As to the title of Part Four, the Committee had decided on "Local remedies" rather than "Exhaustion of local remedies" so that that part and article 8 [10] would not have the same title.

3. The titles and texts of the draft articles adopted by the Drafting Committee read as follows:

#### DIPLOMATIC PROTECTION

##### *Article 8 [10]. Exhaustion of local remedies*

1. A State may not bring an international claim in respect of an injury to a national or other person referred to in article 7 [8]\* before the injured person has, subject to article 10 [14], exhausted all local remedies.

2. "Local remedies" means the remedies which are as of right open to the injured person before the judicial or administrative courts or bodies, whether ordinary or special, of the State alleged to be responsible for the injury.

##### *Article 9 [11]. Classification of claims*

Local remedies shall be exhausted where an international claim, or request for a declaratory judgement related to the claim, is brought preponderantly on the basis of an injury to a national or other person referred to in article 7 [8].\*

##### *Article 10 [14]. Exceptions to the local remedies rule*

Local remedies do not need to be exhausted where:

(a) The local remedies provide no reasonable possibility of effective redress;

(b) There is undue delay in the remedial process which is attributable to the State alleged to be responsible;

(c) There is no relevant connection between the injured person and the State alleged to be responsible, or the circumstances

\* Resumed from the 2764th meeting.

<sup>1</sup> For the text of articles 1 to 7 of the draft articles on diplomatic protection and the commentaries thereto provisionally adopted by the Commission at its fifty-fourth session, see *Yearbook ... 2002*, vol. II (Part Two), chap. V, sect. C.

<sup>2</sup> Reproduced in *Yearbook ... 2003*, vol. II (Part One).